



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FCP - 175602

PRELIMINARY RECITALS

Pursuant to a petition filed on July 18, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by the MY Choice Family Care regarding Medical Assistance (MA), a hearing was held on September 28, 2016, by telephone.

The issue for determination is whether the respondent correctly discontinued the petitioner's Family Care benefit due to lack of *nonfinancial* eligibility.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
MY Choice Family Care
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:
Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. The Family Care program is a nursing home diversion program for low-income, targeted groups, such as the disabled and elderly. The petitioner, age 36, is not elderly. The petitioner's medical history is significant for a stroke in 2012. Following open heart surgery in March, 2015, petitioner entered a skilled nursing facility with the assistance of My Choice Family Care .
3. On April 27, 2016, petitioner was re-screened for nonfinancial eligibility. As a result of that functional screening, the FC program determined that the petitioner was no longer functionally eligible for the program. The respondent notified petitioner of its determination on July 11, 2016. The petitioner timely appealed.
4. On or about July 20, 2016, the FC agency conducted a rescreen, which again concluded that petitioner was no longer functionally eligible for the Family Care program and was no longer eligible for "nursing home level" FC benefits for failure to satisfy the nursing home related functional eligibility requirements of the program.
5. The petitioner has diagnoses of diabetes mellitus, congestive heart failure, hypertension, anxiety disorder, depression, episodic mood disorder, psychosis, and bipolar disorder.
6. Petitioner meets the FC program's severe and persistent mental illness target group.
7. *ADLs*. The petitioner is ambulatory and independent in bathing, dressing, grooming, eating, toileting, and transferring.
8. *Instrumental ADLs*. The petitioner is independent in meal preparation, managing money, doing laundry and household chores, and using the telephone. The petitioner requires assistance with medication management and transportation. \

DISCUSSION

The Family Care Long Term Care (FC) program is a long-term care benefit that serves target groups consisting of elderly people (65 or over), people with physical disabilities and those with developmental disabilities. See, Wis. Stat. §46.286, and Wis. Admin. Code ch. DHS 10, and the FC § 1915(c) waiver document #0368.R02.00, available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Home-and-Community-Based-1915-c-Waivers.html>. The Department's policy instructions for FC eligibility require a person to meet "full benefit EBD Medicaid ... non-financial requirements." Medicaid Eligibility Handbook (MEH), § 29.3.1, available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>. The nonfinancial requirements for EBD Medicaid are that a person must be elderly, blind, or disabled to Social Security Disability/SSI standards. See, Wis. Stat. § 49.47(4)(a)4; 42 C.F.R. § 441.301(b)(6)(i), cross-referencing 42 C.F.R. § 435.540 [federal rule]. Additionally, a person within one of the target groups must require nursing-home level care, even though s/he lives outside of a nursing home. Wis. Stat. § 46.286(1)(a).

In order to qualify for FC services, with certain exceptions not applicable here, a person's functioning must be such that they would otherwise require institutional care. Wis. Stat. §46.286(1)(a). Essentially, a person must require some sort of in-home care or therapy that reaches a level of nursing facility care. To be found eligible, the applicant must undergo an assessment of his/her needs and functioning.

In this case, the Department found that the petitioner no longer fit its definition of being a member of the Physical Disability (PD) "target group" because she has too few or no limitations in the areas ("domains") of self-care (ADLs), IADLs, communication, learning mobility and self-direction. Additionally, even though petitioner does fit into the severe and persistent mental illness target group, her functioning is at a level that does not require nursing home care. Therefore, she is no longer eligible for the program. The petitioner counters that her care giver dresses her daily due to right-side weakness, alleges that the uses

walls and furniture to assist her in moving around her home, and asserts that she needs assistance with laundry, cooking, and transportation.

The petitioner's medical records simply do not support the testimony of the petitioner regarding her present needs. The nursing home level of care, which is also referred to as the comprehensive level of care, requires a person to demonstrate that she requires substantial help from another person by proving that she cannot perform some specified combination of activities and instrumental activities of daily living:

A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or
 - b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Admin. Code, § DHS 10.33(2)(c).

Activities of daily living, or ADLs, refer to "bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet." Wis. Admin. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refer to "management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site." Wis. Admin. Code, § 10.13(32)

Agencies must determine eligibility using a uniform functional screening tool prescribed by the Department. Wis. Admin. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. *See DHA Decision No. FCP-44/115906*. Because the administrative code has the force of law, I must follow it rather than the screening tool.

Although the petitioner continues to have significant diagnoses, I found little evidence that she continues to meet the nursing home level of care. The respondent testified that its screeners noted that petitioner has no real trouble performing her activities of daily living. Because she can perform her ADLs, she must

show that she cannot adequately perform five of her instrumental activities of daily living, that she has a cognitive impairment and cannot perform four of her IADLs, or that she has a complicating condition that limits her ability to meet her needs independently. The record before me fails to establish a qualifying scenario here. It demonstrates that the petitioner needs assistance with two IADLs, which does not give rise to eligibility.

This means that to continue to meet the nursing home level of care, she must demonstrate that she has a complicating condition that limits her ability to independently meet her needs. She has not established that she requires frequent medical or social intervention to safely maintain an acceptable health or developmental status. Nor does she require frequent changes in service due to intermittent or unpredictable changes in her condition. And she has not established that she requires a range of medical or social interventions due to a multiplicity of conditions. Thus she does not meet the first prong of the required two-part test she must meet to demonstrate she has a complicating condition. This means that it is unnecessary to show that she meets the second part.

Based upon this, I find that petitioner is no longer eligible for Family Care at the nursing home level of care under Wis. Admin. Code, § DHS 10.33(2)(c)2. I note to petitioner that nothing in this decision would prevent her from re-applying for FC eligibility in the future.

CONCLUSIONS OF LAW

The petitioner does not meet the nursing home level of care.

THEREFORE, it is

ORDERED

The petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

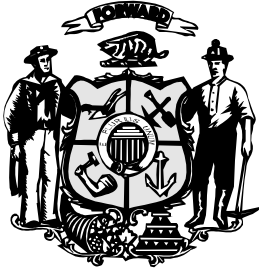
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES

IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 4th day of November, 2016

\s _____
Peter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 4, 2016.

MY Choice Family Care
Office of Family Care Expansion
Health Care Access and Accountability